89-1778

No._____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

SUZANNE E. GWIN,
Petitioner,

v.

G.D. SEARLE AND CO., a Corporation,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Petition For Writ of Certiorari

Of Counsel:
David Schultz
801 12th St., Ste. 600
Sacramento, CA 95814
(916) 444-7552

A. John Merlo
Counsel of Record
645 Normal Avenue
Chico, CA 95928
(916) 343-3513

May 9, 1990

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QUESTION PRESENTED

1. Whether a United States District Court, consistent with the Fifth Amendment of the United States Constitution, and without applying procedural due process as adopted by this court, may, under the authority of local rules promulgated for efficient dispatch of business in the court, deny a party an opportunity for an oral hearing before the court with regards to the dismissal with prejudice of their civil cause of action wherein lies the party's only remedy for a substantial injury to the party's ability to exercise a fundamental right.

LIST OF PARTIES

The petitioner is Suzanne E. Gwin, the plaintiff-appellant below in the United States Court of Appeals for the Ninth Circuit. The respondent is G.D. Searle and Co., a corporation, the defendant-appellee below in the United States Court of Appeals for the Ninth Circuit.

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Petition For Writ of Certiorari

The petitioner Suzanne E. Gwin respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit, entered in proceedings between the above parties on November 15, 1989.

OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit filed on November 15, 1989, No. 88-15374, disposition not appropriate for publication, is reprinted in the appendix hereto, p.14 a, infra.

The Ninth Circuit's denial of a petition for rehearing and rejection of a suggestion for rehearing en banc, entered on February 12, 1990, is reprinted in the appendix hereto, p. 21 a, infra.

The order of the United States District Court for the Eastern District of California denying petitioner's motion for relief from judgment, pursuant to Fed. R. Civ. P. 60(b)(6), in civil case No. CIVS-86-260 RAR, and order vacating the oral argument in the matter, made pursuant to United States District Court, Eastern District of California, Local Rule 230(h), entered on August 25, 1988, is reprinted in the appendix hereto, p. 6 a, infra.

The judgment of the United States District Court for the Eastern District of California dismissing with prejudice petitioner's civil action, No. CIVS-86-260-RAR, pursuant to United States District Court, Eastern District of California, Local Rule 271, entered on February 11, 1987, is reprinted in the appendix hereto, p. 4 a, infra.

JURISDICTION

The petitioner invoking diversity jurisdiction under 28 U.S.C., sec. 1332 brought this suit in the United States District Court, Eastern District of California. On February 11, 1987, the District Court entered a judgment dismissing the action with prejudice pursuant to the Eastern District of California, Local Rule 271.

A motion was made by petitioner to the District Court for relief from judgment

under Fed. R. Civ. P. 60(b)(6). On August 25, 1988, the District Court denied petitioner's motion, and vacated the scheduled oral argument on the matter pursuant to the Eastern District of California, Local Rule 230(h).

The petitioner appealed the District Court's denial of the 60(b)(6) motion to the United States Court of Appeals for the Ninth Circuit pursuant to 28 U.S.C., Sec. 1291. The Appellate Court affirmed the District Court's denial of the 60(b)(6) motion on November 15, 1989. Petitioner's petition for rehearing and suggestion for rehearing en banc, was denied by the Court of Appeals on February 12, 1990.

The jurisdiction of this court to review the judgment of the Court of Appeals for the Ninth Circuit is invoked under 28 U.S.C., Sec. 1254(1).

STATUTES INVOLVED

1. Fifth Amendment, United States Constitution:

"No person . . . nor shall any person . . . be deprived of life, liberty, or property, without due process of law . . .."

2. Fed. R. Civ. P. 78:

". . . . To expedite its business, the court may make provision by rule or order for the submission and determination of motions without oral hearing upon brief written statements of reasons in support and opposition."

3. United States District Court, Eastern District of California, Local Rule 230(h), reprinted in its entirety in the appendix hereto at p. 26 a, infra.

" Upon the call of the motion, the Court will hear appropriate and reasonable oral argument. Alternatively, the motion may be submitted upon the record and briefs

on file if the parties stipulate thereto, or if the Court so orders . . . ."

4. United States District Court, Eastern District of California, Local Rule 271, reprinted in the appendix hereto at p. 27 a, infra.

5. Fed. R. Civ. P. 60(b), reprinted in the appendix hereto at p. 24 a, infra.

6. Fed. R. Civ. P. 41(b), reprinted in the appendix hereto at p. 23 a, infra.

STATEMENT OF THE CASE

The Petitioner, Gwin, filed suit on March 5, 1986, in the United States District Court for the Eastern District of California (hereinafter referred to as the District Court) invoking diversity jurisdiction under 28 U.S.C. Sec. 1332, against the respondent, G. D. Searle and Co. (hereinafter referred to as Searle) for damages she suffered as a result of her use of an intrauterine contraceptive device, known as "Copper 7".

In the suit, petitioner alleged Searle's liability arose out of Searle's conduct in placing the defective Copper 7 in the stream of commerce. More specifically, petitioner alleged therein Searle's conduct that gave rise to Searle's liability, which included design, manufacture, assembly, marketing, advising medical professionals, distribution, advertisement, and other associated acts and omissions.

The harm suffered by the petitioner resulting from her use of the Copper 7, as alleged in her complaint, included the permanent loss of the ability to procreate, damage to her ovaries and fallopian tubes, pelvic inflammatory disease, unusual bleeding, uterine infection, pain and accompanying emotional trauma. The substantial injury being her loss of the ability to give birth.

After filing the action and conducting

research into the factual and legal nature of the case, petitioner's attorney of record in the District Court, the Law Office of A. John Merlo (hereinafter referred to as Merlo), made a determination to seek outside counsel specializing in the field of intrauterine contraceptive products liability litigation. Due to the complex nature of the Copper 7 litigation, the search for an outside specialist with which to associate escalated into a nationwide search.

In July of 1987, after many unsuccessful attempts to locate a qualified associate counsel, Merlo's Chico California office contacted the Law Offices of Robins, Zelle, Larson and Kaplan (hereinafter referred to as "Robins") in Minneapolis, Minnesota. After Robins reviewed petitioner's file; Merlo, Robins, and petitioner signed an association retainer agreement on January 20, 1988.

On March 1, 1988, Robins served interrogatories on respondent Searle. Thereafter, Robins was notified by Searle's attorney that the matter had been dismissed in February 1987 with prejudice, by order of the District Court, pursuant to United States District Court, Eastern District of California, Local Rule 271 (hereinafter referred to as "Local Rule 271). See p. 27 a, infra. Petitioner contends that it was in March 1988, after Robins served the interrogatories, that she and her attorney first became aware of the February 1987 dismissal of her civil suit.

On May 20, 1988, Petitioner's counsel, Merlo, filed a motion for relief from judgment under Fed. R. of Civ. P. 60(b)(6) based upon a lack of notice for both the hearing to dismiss and the entry of the judgment, and that petitioner's counsel had been diligent in seeking and retaining associate counsel specializing in the

technical medical and legal issues involved in the case.

A hearing before the District Court was scheduled in the motion for relief from judgment on August 29, 1988. Both the petitioner and respondent filed statements and accompanying documentation. A factual dispute as to whether petitioner's counsel received notice of the February 1987 hearing to dismiss was set forth in both the petitioner's and respondent's papers.

Respondent's opposition to the motion and accompanying affidavits alleged five instances, two before and three after the judgment, in which notice was allegedly sent to petitioner's counsel with regards to the February 4, 1987 hearing to dismiss.

Two notices were alleged by respondents as being sent <u>before</u> the February 4, 1987 dismissal. The first, a notice to show cause why the action should not be dismissed sent by the District Court

was incorrectly addressed, having been sent to a 95926, rather than to the 95928 zip code. The second alleged notice before the dismissal is respondent's alleged service of an affidavit supporting dismissal for lack of prosecution mailed on January 28, 1987. Petitioner contends that neither notice was ever received by her or her attorney.

Respondent also alleged three notices as being sent to petitioners's attorney after the dismissal of petitioner's action with prejudice on February 4, 1987. The first, respondent's alleged service of a copy of the Order Re Dismissal With Prejudice lodged with the District Court. The second, a service by the District Court of the signed order, also incorrectly addressed to the wrong zip code as noted above. The third, a service of the notice of entry of judgment by the District Court also incorrectly addressed to the wrong zip

code. Petitioner contends that neither of these three notices were ever received.

An affidavit was also attached to respondent's opposition to the motion referencing a telephone conversation allegedly made to respondent's counsel by petitioner's counsel.

The evidence submitted with petitioner's motion for relief from judgment included the following: 1) Affidavit of A. John Merlo, 2) Affidavit of Cindy Okumoto, the attorney in Merlo's office assigned responsibility for the case, 3) Copies of documents pertaining to the search for and obtaining associated counsel, 4) A copy of Merlo's firm's office calendar showing no calendar entries for a February 4, 1987, hearing, and 5) Affidavit of petitioner, SUZANNE E. GWIN, who reviewed and copied her litigation file.

The substance of the evidence

submitted by petitioner in support of the motion for relief of judgment was that neither Merlo, Okumoto nor petitioner Gwin, had any contemporaneous or subsequent notice of the February 4, 1987 hearing on dismissal or the resulting judgment. Contentions by the petitioner in support of the motion for relief from judgment included: 1) That petitioner's counsel had not received notice of the February 4, 1987 hearing, Order of Dismissal, or Notice of Judgment, 2) That an extensive and comprehensive search of Merlo's firm was made and failed to turn up any of the aforementioned notices, 3) That petitioner Gwin had no notice of the aforementioned hearing nor did she see any notice thereof when she reviewed and copied her file, 4) That an extensive nationwide search was made by Merlo for an associate counsel competent to deal in the specialized nature of intrauterine contraceptive products

liability litigation involving the Copper 7 device, 5) That an agreement with associate counsel Robins located in Minneapolis, Minnesota to represent petitioner was entered into, and 6) That Merlo first obtained knowledge in March 1988 that petitioner's case had been dismissed in the District Court.

The District Court summarily determined that an oral argument would not be of material assistance in deciding the 60(b) motion, and evoked its local rule 230(h), ordering the matter submitted on the moving papers. The District Court made a finding of fact, without oral argument or oral testimony, that petitioner had received notice, and as such, that the evidence in the record failed to demonstrate "extraordinary circumstances". The court did not consider in its opinion the countervailing interests, namely, the risk of error in denying oral testimony and

oral argument, the substance of the right denied to petitioner, nor the burden on the court in denying the petitioner an opportunity for oral testimony and oral argument.

Petitioner appealed to the Ninth Circuit claiming that the District Court had abused its discretion in denying the motion and summarily deciding to deny an oral argument. The Ninth Circuit affirmed the District Court. The Ninth Circuit's opinion focused on the believability of petitioner's counsel and concluded that the District Court was proper in determining that since petitioner's counsel's sworn affidavits were not credible, and that such sworn statements did not overcome the presumption that "when a document is properly stamped, addressed, and placed in the mails ... that the document will be received in due course", that the District Court did not abuse its discretion in

concluding petitioner did not establish extraordinary circumstances.

REASONS FOR GRANTING THE WRIT

I

DENYING A PARTY AN OPPORTUNITY FOR AN ORAL HEARING BEFORE THE COURT WITH REGARDS TO THE DISMISSAL WITH PREJUDICE OF THEIR CIVIL CAUSE OF ACTION WHEREIN LIES THE PARTY'S ONLY REMEDY FOR A SUBSTANTIAL INJURY TO THE PARTY'S ABILITY TO EXERCISE A FUNDAMENTAL RIGHT, WITHOUT APPLYING THE PROCEDURAL DUE PROCESS ADOPTED BY THIS COURT, IS REPUGNANT TO THE FIFTH AMENDMENT OF THE UNITED STATES CONSTITUTION.

It is not contested that a federal trial court has the authority to dismiss a plaintiff's action for his or her failure to prosecute with reasonable diligence, and that such action is necessary in order to prevent undue delays is the disposition of pending cases and to avoid congestion in the calendars of the District Courts. Link v. Wabash Railroad Co., 370 U.S. 626, 629 (1962). However,"[t]he sanction of dismissal is the most severe sanction a court may apply, and its use must be

tempered by a careful exercise of judicial discretion." (citation) (Durham v. Florida East Coast Railway Company 385 F.2d 366, 368, (5th Cir. 1967)

To avoid summarily depriving a party of its property interest in a civil suit summarily without procedural due process manifesting in a notice and hearing, a plaintiff is afforded an opportunity to "show cause" and explain any delay in bringing the case to trial and why certain actions have not been taken. (See: District Court, Eastern District of California, Local Rule 271, at p. 27 a, infra, which establishes a requirement for both notice and hearing requirements prior to dismissal of a party's case.) Local Rule 271 provides that only "[a]t the hearing" the court may "dismiss the action for lack of prosecution or for other good reason . . . ."

This opportunity to have a hearing is

a cornerstone of the American judicial system. The Fifth Amendment provides that no person may be deprived of life, liberty or property without due process of law. The fundamental requisite of due process is the opportunity to be heard." Mullane v. Central Hanover Trust Co. 339 U.S. 306, 314 (1950). Thus, if a suit is properly dismissed pursuant to Local Rule 271, a notice and hearing is provided.

An arguable, but not an essential premise to granting this writ is, that if the petitioner did not receive notice of the hearing to dismiss for lack of prosecution pursuant to Local Rule 271, then the petitioner did not receive the requisite due process required by the Fifth Amendment. But, if the test adopted by this Court to determine what procedural process is due, is not applied in a motion to set aside the earlier judgment, then a dismissal will be repugnant to the Fifth

Amendment guarantee of procedural due process and a writ should issue.

A. The Balancing Test

In Link, supra at p. 632, this Court held that the failure to hold an adversary hearing does not necessarily render a dismissal void. However, the court in Link enunciated a balancing test, mirroring that which the court has raised in other due process inquires. That is, the process due is functionally related to the right for which the constitutional protection of procedural due process is invoked.

> " It is true of course, that " the fundamental requirement of due process is an opportunity to be heard upon such notice and proceedings as are adequate to safeguard the right for which the constitutional protection is invoked" Anderson National Bank v. Luckett, 321 U.S. 233, 346 ..." (emphasis provided)
> Link at p. 632

Thus, this Court has determined that the procedures required to provide the fundamental fairness and protections of the

Fifth Amendment right to due process depend on the interest effected. The inquiry into what interest is effected is the threshold question.

> "More precisely, our prior decisions indicate that identification of the specific dictates of due process generally requires consideration of three district factors: First, the private interest what will be affected by the official action: second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirements would entail" Mathews v. Eldridge 424 U.S. 319, 335 (1976)

The District Court below in this case erroneously applied a "material assistance" test to determine if an oral argument was required, it did not address the questions determined to be essential by this Court in procedural due process inquiries.

"A review of the record convinces the court that oral argument will not be of material assistance."

(See: Order of the District Court in the appendix hereto at p. 6 a, infra.)

B. The Substantial Right

This Court has held that there are rights having a value so essential to the individual and "implicit in the concept of ordered liberty" (Roe v. Wade, 410 U.S. 113, 152 (1973)) that they justify the Court acting with strict judicial scrutiny. Included in these fundamental rights, more particularly within the right to privacy, is the right to child-bearing and child-rearing. The court has determined that any government action that interferes with or deprives a party of a fundamental right, such as child-bearing and child-rearing, to be constitutional, must be necessary to a compelling government interest, and further, that such interference or

deprivation should be subject to strict scrutiny by this Court. (see: Skinner v. Oklahoma, 316 U.S. 535 (1942) and Cary v. Population Services International, 431 U.S. 678 (1977) and Roe v. Wade, 410 U.S. 113 (1973)).

Thus, if the right to be dealt with in substantive due process warrants a strict scrutiny test, it should follow that when the same right is dealt with in procedural due process it should weigh heavy on the scale as a substantial right when determining what process is due. Moreover, it should signal to the court that a further inquiry should be made before such right can be summarily terminated.

In the present case, the petitioner was seeking a remedy for the tortious deprivation of her right to procreate. The dismissal of her suit with prejudice and the subsequent denial of an oral argument and oral hearing in a motion to set aside

the judgment, deprived her of a substantial right, a right to seek a remedy for the permanent deprivation of her ability to procreate, in summary fashion without her day in court, and without the procedural due process requirements established by this Court.

C. The Risk of Error

The risk of erroneously depriving the petitioner of her right to seek a remedy for her loss of the ability to procreate, in a summary disposition, provides a high risk of error. More specifically, the issue which was determined in petitioner's 60(b) motion was factual in nature. That is, the question determined by the District Court was whether petitioner had actually received notice of the February 4, 1987, hearing for dismissal pursuant to Fed. R. Civ. P. 41(b) and Local Rule 271. Essentially, there was fact finding without orally hearing from the parties in an

adversary setting. Further, the Appellate Court's decision focused on the credibility of sworn statements.

The latchkey to reducing the risk of error in any fact finding process is the opportunity to make an oral presentation to the decision-maker, including: an opportunity to present evidence or witnesses to the decision-maker, a chance to confront and cross-examine witnesses or evidence to be used against an individual, to have the fact-finder view the veracity and demeanor of witnesses, as well as having adequate notice and time to prepare evidence for such proceedings. (See: Nowak, Rotunda & Young, Const. Law, sec. 13.7, What Process is Due? (3rd Ed 1986))

> "This Court consistently has held that some form of hearing is required before an individual is finally deprived of a property interest. (citations) The "right to be heard before being condemned to suffer grievous loss

> of any kind, even though it may not involve the stigma and hardships of a criminal conviction, is a principal basic to our society" (Citations). The fundamental requirement of due process is the opportunity to be heard "at a meaningful time and in a meaningful manner" (citations) Mathews, supra at p. 933.
>
> "Particularly where credibility and veracity are at issue, ... written submissions are a wholly unsatisfactory basis for decision. . . In almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses.(citations)" Goldberg v. Kelly, 397 U.S. 254, 269-270 (1970)

D. The Burden on the Court

It can be well expected that the burden upon the District Courts would be significant, if every time it dismissed an action pursuant to Fed. R. Civ. P. 41(b) a hearing was required. Further, such a requirement would be contrary to previous decisions of the Court as in Link, supra.

However, not tempering the District Court's ability to dismiss a case with prejudice under the premise to facilitate the prompt dispatch of business, in order to be consistent with the balancing test adopted by this Court to protect a party's constitutional right to due process, would permit a District Court to significantly depart from the accepted and usual course of applying a procedural due process standard.

Allowing a District Court to apply a "material assistance" test and nothing else, as the lower court did in this instance, when determining whether an oral argument or oral hearing is required, is not consistent with the protection of the Fifth Amendment as enunciated by this Court when a substantial right is jeopardized.

To ease any threat of overburdening the District Courts, and provide for useful guidance, a decision by this court must

provide some distinguishing factor to guide the lower courts. Admittedly, the requirement of a having an oral hearing and argument upon every question of law or fact acted upon by a District Court would be too rigid and an all inclusive confinement of the Judiciary.

Fortunately, the Fifth Amendment has not been held to be so broad, but in cases where substantial rights are involved, the Fifth Amendment has been held to encompass such depth to provide an oral hearing and argument. (See: Federal Communication Com'n v. WJR, The Goodwill Sta., 337 U.S. 265, 274-275, (1949)

Conceivably, the right affected could be the distinguishing factor. At first glance, the qualification of what a substantial right is, is as amorphous as the principle of procedural due process. However, a bright line does exist between those rights which are non-substantial and

those which are fundamental, a standard available for the Court to distinguish.

The latter rights, worthy of strict judicial scrutiny, as fundamentally constitutional endowed rights, are substantial rights to the "concepts of ordered liberty". Deprivation thereof, or deprivation of the right to seek a remedy for the tortious deprivation thereof, demands a prerequisite that the essentials of procedural due process be provided - a notice and a meaningful hearing.

E. The Need for Judicial Consistency

Consideration by this Court is necessary to establish a consistency among the judicial districts in applying the proper test to determine whether a notice and oral hearing and argument is required when a fundamental right is the subject of a 60(b) motion. The lower courts need guidance in formulating a guide as to when an oral hearing and argument is warranted,

and when to apply a procedural due process test and not a "material assistance" test.

To summarily dismiss the petitioner's 60(b) motion without a hearing deprived her, without the requisite procedural due process entitled under the Fifth Amendment, of the only right she had to seek a remedy for the tortious deprivation of her fundamental right to procreate.

In Link, supra at p 632, this Court in reaching its decision, reasoned that the District Court had authority to dismiss sua sponte for failure to prosecute, without affording notice to do so or providing a adversary hearing before acting, but it buttressed its decision authorizing a summary disposition by looking to the availability of a subsequent corrective remedy, provided by Fed. R. Civ. P. 60(b) to authorize the re-opening of the case, and to provide the necessary procedural due process.

When the 60(b) motion is summarily decided without the full protections of procedural due process, the rationale of Link suffers, and creates significant doubt as to whether this Court would accept a summary dismissal of a 60(b) motion without an oral hearing when a substantial right is involved.

> "Courts exist to serve the parties, and not to serve themselves, or to present a record with respect to dispatch of business. * * * For the court to consider expedition for its own sake 'regardless' of the litigants is to emphasize secondary considerations over primary." (citation) Durham v. Florida East Coast Railway Company, 385 F.2d 366, 368 (5th Cir. 1967)

If a Court is to emphasize the judicial dispatch of business over the right to due process, when litigants pursue redress for a substantial injury to a fundamental right, the danger is present that the Court's action will be repugnant

to the Fifth Amendment.

This Court has an obligation to stand as the final vanguard to protect the constitutional rights of the individual. As our courts overcrowd and judicial burdens increase, it is very tempting to prioritize judicial efficiency over the protection of the individual rights. If this Court does not act and yields to such temptation, it will fail in its duty.

> "The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is afford that protection . . . . The government of the United States has been emphatically termed a government of laws and not men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested right" Marbury v.Madison, 5 U.S. 137, 163 (1803).

This Court has ruled that prior to the termination of benefits, a welfare recipient is entitled to 1) adequate

notice, 2) an opportunity for an oral argument, 3) a chance to present evidence in his or her behalf, 4) an opportunity to confront any adverse witness, 5) an opportunity to cross-examine a witness, 6) disclosure of all evidence against him, 7) a right to an attorney, 8) a decision based solely on the evidence produced at the hearing, 9) a statement by the decision-maker, and 10) an unbiased and impartial decision-maker; (See: Goldberg v. Kelly, 397 U.S. 254)

Therefore, to allow a summary denial of a litigant's opportunity for an oral hearing and argument in a motion to set aside an earlier judgment, wherein said motion a factual question exist as to whether notice was ever received in the first judgment, and when the court in the earlier judgment also acted summarily in dismissing the litigant's suit with prejudice, and the remedy sought in the

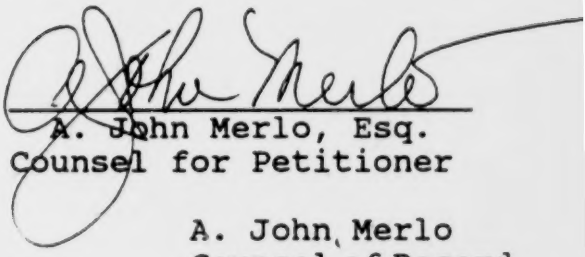
dismissed suit was the litigant's only remedy for the tortious deprivation of the party's ability to exercise a fundamental right, there is a failure of the court to uphold procedural due process as guaranteed by the Fifth Amendment to the United States Constitution.

CONCLUSION

This petition for certiorari should be granted to establish a judicial consistency in applying procedural due process to insure an oral hearing is afforded a party where a dismissal with prejudice of their suit would substantially impair the parties ability to seek redress for a substantial interference in a fundamental right. The decision should be remanded down to the district court, for a full development of the facts, in compliance with this Court's standards of procedural due process with an oral hearing, and subsequent ruling by the

court.

Respectfully Submitted,



A. John Merlo, Esq.
Counsel for Petitioner

Of Counsel:
David Schultz
801 12th St., Ste. 600
Sacramento, CA 95814
(916) 444-7552

A. John Merlo
Counsel of Record
645 Normal Avenue
Chico, CA 95928
(916) 343-3513

May 9, 1990

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

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SUZANNE E. GWIN,
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Respondents

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APPENDIX TO PETITION
FOR WRIT OF CERTIORARI

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Appendix

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Appendix

CHRONOLOGICAL LIST OF
RELEVANT DOCKET ENTRIES

March 5, 1986 -- Plaintiff Gwin's complaint filed in U.S District Court for the Eastern District of California.

April 1, 1986 -- Defendant G.D. Searle Co.'s answer filed.

February 9, 1987 -- Case dismissed by United States District Court for lack of prosecution.

May 20, 1988 -- Plaintiff Gwin filed motion for relief from judgment.

June 3, 1988 -- Court entered a minute order changing the hearing date from June 20, to August 29, 1988.

August 25, 1988 -- Plaintiff's Motion for Relief From Judgment denied and hearing vacated.

November 15, 1989 -- Memorandum of Decision United States Court of Appeals.

February 12, 1990 -- Order Denying Petition for Rehearing and Rejection of Suggestion of Rehearing En Banc by United States Court of Appeals.

Appendix

Case: CIVS-86-260-RAR

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

SUZANNE E. GWIN, Plaintiff,

v.

G.D. SEARLE & COMPANY, et al., Defendants

Filed February 9, 1987.

ORDER RE DISMISSAL WITH PREJUDICE

In accordance with the January 5, 1987 Order of this Court that this matter be placed on calendar pursuant to Local Rule 271 for dismissal for lack of prosecution, the matter came on regularly for hearing on February 4, 1987, the Honorable Raul A. Ramirez presiding. Robert B. Zaro of Weintraub Genshlea Hardy Erich & Brown, a

Professional Corporation, appeared for defendant G. D. SEARLE & CO. No appearance was made by plaintiffs.

Based upon the court's review of the file in this matter and good cause appearing therefor,

IT IS HEREBY ORDERED that plaintiff's complaint be dismissed with prejudice pursuant to Local Rule 271 and Federal Rules of Civil Procedure 41(b) for failure to prosecute this action.

DATED: 2/9/87

THE HONORABLE RAUL A. RAMIREZ

Appendix

No. CIVS-86-260 RAR

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

SUZANNE E. GWIN, Plaintiff,

v.

G.D. SEARLE & COMPANY, et al., Defendants

ORDER

Filed August 25, 1988.

Presently pending on this court's law and motion calendar for August 29, 1988 is plaintiff SUZANNE E. GWIN's motion for relief from judgment pursuant to F.R.Civ.P 60(b)(6). A review of the record convinces the court that oral argument will not be of material assistance. Accordingly, the

court orders the matter submitted on the moving papers. E.D. Cal. L.R. 230(h).

BACKGROUND

Plaintiff SUZANNE E. GWIN filed her complaint in the above-captioned action on March 5, 1986. On January 5, 1987, this court sent a notice of dismissal for lack of prosecution to the parties directing counsel to file affidavits within certain dates and to appear before this court on February 4, 1987, at 1:30 p.m., to show cause why this action should not be dismissed. On January 27, 1987 counsel for defendant G.D. SEARLE & CO. timely filed an affidavit supporting dismissal. Counsel for plaintiff failed to file an affidavit in opposition to dismissal.

A hearing with regard to the court's motion to dismiss for lack of prosecution was held, as scheduled on February 4, 1987.

Appendix

Mr. Robert Zaro appeared on behalf of defendant G.D. SEARLE & CO. No appearance was made on behalf of the plaintiff. Pursuant to order dated February 9, 1987, this court dismissed plaintiff's complaint with prejudice pursuant to E.D. Cal. L.R. 271 and F.R.Civ.P. 41(b) for failure to prosecute the action. Judgment was entered on February 11, 1987 and notice that judgment was entered was sent to the parties on that same date.

DISCUSSION

By the present motion, plaintiff seeks relief from the final judgment entered in this action on February 11, 1987 pursuant to F.R.Civ. 60(b)(6). That rule states in pertinent part:

> On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: ...

> (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time....

Rule 60(b) is remedial in nature and must be liberally applied. Pena v. Seguros La Commercial, S.A., 770 F.2d 811, 814 (9th Cir. 1985). The decision whether to set aside a judgment pursuant to rule 60(b) is left to the discretion of the trial court. Lafarge Conseils Et Études, S.A. v. Kaiser Cement, 791 F.2d 1334, 1338 (9th Cir. 1986). A motion brought under rule 60(b)(6) must be based on grounds other than those listed in the preceding clauses. Id. Citing Corex Corp. v. United States, 638 F.2d 119, 121 (9th Cir. 1981). In addition the clause is reserved for "extraordinary circumstances." Lafarge Conseils Et Etudes, S.A. v. Kaiser Cement, 791 F.2d at 1338.

Plaintiff asserts that judgment in

this action should be set aside because neither she nor her counsel received (1) the notice of hearing on dismissal for lack of prosecution, (2) the affidavit of Robert B. Zaro supporting dismissal for lack of prosecution, (3) the order re dismissal of this action with prejudice for lack of prosecution, (4) the notice of entry of judgment, or (5) the judgment. In support of this assertion, plaintiff filed a declaration of Cindy R. Okumoto stating that as the attorney assigned to this case, she did not receive the aforesaid document; and (2) a copy of the calendar of plaintiff's counsel's law office during the relevant time period.

Two factors warrant a denial of plaintiff's motion for relief from judgment in this action. First, the file reflects that plaintiff's counsel was properly

served with each of these documents. Plaintiff does not assert that the address of plaintiff's counsel is different from that appearing on the proofs of service, and the file does not reflect that any of the documents sent by this court were returned, "not delivered" by the post office. Secondly, final judgment was entered on February 11, 1987. Plaintiff did not file a motion for relief of said judgment until May 20, 1988. Plaintiff offers no persuasive excuse for her failure to move for relief from a judgment which was entered more than a year before.

The evidence in the record clearly indicates that plaintiff has failed to demonstrate "extraordinary circumstances" warranting relief from the operation of the judgment entered in this case under Rule 60(b)(6). Further, plaintiff has failed to

demonstrate that the present motion was made within a reasonable time, as required by Rule 60(b). Accordingly, plaintiff's motion for relief from judgment shall be denied.

For the foregoing reasons, and good cause appearing therefor,

IT IS HEREBY ORDERED that the hearing scheduled in this matter for August 29, 1988, at 9:00 a.m., is VACATED.

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IT IS FURTHER ORDERED that plaintiff's motion for relief from judgment pursuant to F.R.Civ.P. 60(b)(6) is DENIED.

IT IS SO ORDERED.

Appendix

DATED: August 24, 1988

RAUL A. RAMIREZ, JUDGE
UNITED STATES DISTRICT COURT

Appendix

No. CV-86-260 RAR

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

SUZANNE E. GWIN, Plaintiff,

v.

G.D. SEARLE & COMPANY, et al., Defendants

Filed November 15, 1989.

MEMORANDUM

Appeal from the United States District Court for the Eastern District of California, Raul A. Ramirez, District Judge, Presiding

Submitted October 25, 1989
Portland, Oregon

Before: ALARCON, O'SCANNLAIN, and LEAVY, Circuit Judges.

Suzanne E. Gwin filed a complaint

against defendants on March 5, 1986. On February 11, 1988, the district court entered a judgment dismissing her action with prejudice for failure to prosecute. More than a year later, Gwin moved for relief from the judgment under Fed. R. Civ. P. 60(b)(6). The district court denied oral argument on the motion and denied the motion. Gwin argues on appeal that the district court's denial of the motion was an abuse of discretion. We affirm.

Our review of a denial of a Rule 60(b) motion is for abuse of discretion. Martella v. Marine Cooks & Stewards Union, 448 F.2d 729, 730 (9th Cir. 1971), cert. denied, 405 U.S. 974 (1972). To obtain relief from a judgment under Rule 60(b)(6), the moving party must show "extraordinary circumstances." Corex Corp. v. United States, 638 F.2d 119, 121 (9th

Cir. 1981).

Gwin filed her complaint on March 5, 1986. After Gwin's inaction for almost a year, the district court set February 4, 1987, as the date for a hearing on the dismissal of the action. It is not disputed that the court clerk sent the notice of the hearing to an address corresponding to Gwin's address, except for the last digit of the zip code. For purposes of this decision, we may assume that Gwin did not receive the notice of the hearing sent by the court clerk.

Nevertheless, the notice of the hearing did reach the defendants. the defendants then submitted an affidavit (the "Hearing Affidavit") in support of the dismissal, which affidavit clearly stated the date and time the hearing would take place. The defendants served the Hearing

Affidavit by mail to Gwin's counsel. It is not disputed that this mailing was properly addressed. See Excerpt of Record tab 7; see also Appellant's Opening Brief at 5.

After considering the mailing of the Hearing Affidavit, we conclude the district court did not abuse its discretion in denying the rule 60(b) motion.

When a document is properly stamped, addressed, and placed in the mails, a presumption arises that the document will be received in due course. NLRB v. Local 30, Int'l Longshoremen's Assoc., 549 F.2d 698, 701 (9th Cir. 1977). To rebut the presumption that she received the Hearing Affidavit, Gwin's counsel submitted an affidavit to the effect that she did not receive the Hearing Affidavit. as the district court noted, however, the Post Office did not return the Hearing Affidavit

to the defendants as undelivered mail. Additionally, in opposing the Rule 60(b)(6) motion, the defendants submitted a declaration by defense counsel's secretary that Gwin's counsel spoke with her prior to the February 4, 1987 hearing to request that the hearing be postponed. We recognize, of course, that Gwin's counsel denies this conversation ever occurred.

The district court did not believe Gwin's counsel's statements. Therefore, the presumption that the Hearing Affidavit reached Gwin's counsel was not rebutted by credible evidence. The district court was justified in concluding that Gwin had failed to establish a reason for failing to attend the hearing on the dismissal of her action, and consequently for failing to be on notice of the resulting judgment. Accordingly, the court did not abuse its

discretion when it concluded that Gwin did not establish the extraordinary circumstances necessary to obtain Rule 60(b)(6) relief.

Gwin argues that in spite of the conflicting evidence, she is entitled to relief under Rule 60(b)(6), because that provision is remedial and must be liberally construed to resolve all evidentiary doubts in her favor. We disagree. We have held that the very requirement of a showing of "extraordinary circumstances" contradicts that liberal approach. Corex, 638 F.2d at 121; see also United Artists Corp. v. La Cage Aux Folles, Inc., 771 F.2d1276, 1275 (9th Cir. 1985) (Wallace, J., concurring in part and dissenting in part) ("[u]nlike the rest of Rule 60(b), subdivision (6) is construed harshly against the movant.").

Gwin's remaining arguments are without

merit. Gwin argues that the district court did not review all the relevant evidence submitted for the hearing on the Rule 60(b)(6) motion. We do not think the court had to name all the document submitted by Gwin for its consideration, especially when the documents the court did mention conveyed Gwin's main contention, i.e., that she failed to receive notice of the hearing. Contrary to Gwin's suggestions, we see no abuse in discretion in the district court's denial of Gwin's request for oral argument.

AFFIRMED.

Appendix

No. CVS-86-260 RAR

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

SUZANNE E. GWIN, Plaintiff,

v.

G.D. SEARLE & COMPANY, et al., Defendants

Filed February 12, 1990.

ORDER

Before: ALARCON, O'SCANNLAIN, and LEAVY, Circuit Judges.

The panel has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the en banc suggestion and no judge of the court has requested a vote on it.

The petition for rehearing is DENIED

and the suggestion for rehearing en banc is REJECTED.

Appendix

Federal Rules of Civil Procedure, rule 41(b):

"(b) Involuntary Dismissal: Effect Thereof. For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against the defendant. After the plaintiff, in an action tried by the court without a jury, has completed the presentation of evidence, the defendant, without waiving the right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. the court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence. If the

court renders judgment on the merits against the plaintiff, the court shall make findings as provided in Rule 52(a). Unless the court in its order for dismissal other specifies, a dismissal under this subdivision and any dismissal for lack of jurisdiction, for improper venue, or for failure to join a party under Rule 19, operates as an adjudication upon the merits."

Federal rules of Civil Procedure, rule 60(b):

"(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc. On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake,

inadvertence, surprise; or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofor denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken.

Appendix

United States District Court, Eastern District of California, Local Rules, rule 230 (h):

"(h) Hearing and Oral Argument. Upon the call of the motion, the Court will hear appropriate and reasonable oral argument. Alternatively, the motion may be submitted upon the record and briefs on file if the parties stipulate thereto, or if the Court so orders, subject to the power of the Court to reopen the matter for further briefs or oral arguments or both. Whenever any of the parties believes that extended oral argument, more than 10 minutes per side or 20 minutes in the aggregate, will be required, that party shall notify the courtroom deputy so that the hearing may be rescheduled if deemed appropriate by the Court."

Appendix

United States District Court, Eastern District of California, Local Rules, rule 271:

"(a) Dismissal Calendar. Each Judge will maintain an individual dismissal or status conference calendar. Unless the Judge otherwise order, semiannually each year the Clerk shall order the call of all civil cases which have been pending for more than six month and in which the plaintiff has failed to take action for six months. In the discretion of the Judge, civil cases may be added to or deleted from the call of cases on the dismissal calendar.

"(b) Responses to Dismissal Notice. The Clerk shall notify all parties to show cause by affidavit filed in duplicate why such actions should or should not be

dismissed for lack of prosecution. All such affidavits opposing dismissal shall be filed no later than 14 days prior to the scheduled hearing date; all affidavits supporting dismissal shall be filed not later than 7 days prior to that date. Failure to file a timely response to the dismissal notice may subject counsel or parties of the right to oppose or urge dismissal and to present oral arguments at the hearing, or may be deemed to be an admission that the failure to prosecute has resulted in prejudice to the opposing side.

(c) Hearing. Filing of a certificate of readiness or a stipulation to continue or drop the action from the Court's calendar or any other action taken by the parties (except a voluntary dismissal in strict conformity with F.R.Civ.P. 41(a)) will not remove an action from the

dismissal calendar absent express approval of the Court. Prior to the hearing, the Court may, sua sponte, drop the action from the dismissal calendar or may continue the hearing to a later date, with or without specific directions for action by the parties.

(d) Disposition. At the hearing, the Court may:

"(1) dismiss the action for lack of prosecution or for other good reason.

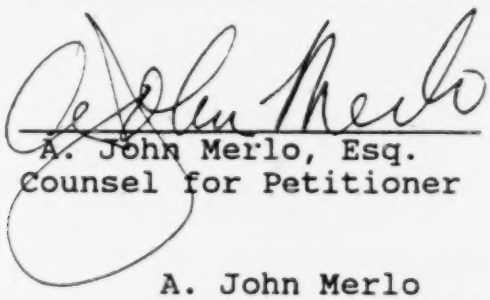
"(2) continue the matter to a later date for further proceedings, with or without specific directions to the parties,

"(3) set the action for status conference or pretrial conference, or

"(4) drop the action from the dismissal calender if the facts so warrant, with or without such additional orders as may be appropriate.

(e) Motions to Dismiss for Lack of Prosecution. This Rule does not impair the right of a party to move for dismissal under the provisions of F.R.Civ.P. 41(b)."

Respectfully submitted,



A. John Merlo, Esq.
Counsel for Petitioner

Of Counsel:
David Schultz
801 12th St., Ste. 600
Sacramento, CA 95814
(916) 444-7552

A. John Merlo
Counsel of Record
645 Normal Avenue
Chico, CA 95928
(916) 343-3513

May 9, 1990